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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 909.

VINCENT SERMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

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FACTS.

The Government misconceives the principal thrust of our contentions, which are:

I. The petitioner *has never had a hearing* on his motion for a new trial nor on his 2255 motion.

(a) The trial judge peremptorily denied a hearing in both instances because he had "an abiding conviction" as to petitioner's guilt.

II. The trial judge should have recused himself precisely because he had "an abiding conviction," and logically therefore he could not judge petitioner's motions impartially, even though he might have had the best intention to be free of bias, if a hearing were granted.

III. The sentences imposed are not authorized under the facts and law of the case.

ARGUMENT.

I. PETITIONER IS ENTITLED TO A PLENARY HEARING.

The Government's argument (pages 5-6 of its Brief) is misleading when it says that:

> "The contention that allegedly new evidence, tending to show John Paladinich's involvement in the manufacture of counterfeit bills, undermines the government's case was previously *raised* and *considered* by this Court in the October 1967 Term on review of the denial of his motion for new trial." (Emphasis supplied.)

This implies that this Court's denial of certiorari is res judicata. The law is otherwise. See: *Brown v. Allen*, 344 U.S. 443, 489-497; see also: *Shepard v. Maxwell*, 384 U.S. 333; *Pacific Gamble-Robinson Co. v. United States*, 270 F.2d 235 (9 Cir.) (1959); and see our discussion of this question on Page 29 of our Petition.

That a contention was *raised* and *considered* by this Court is certainly not to be equated with the proposition that we are not entitled to a *hearing*.

The Government's argument (at page 6 of its Brief) says:

> "As we then pointed out (No. 320, O.T. 1967, p. 6), even if the allegations are accepted, they suggest only that in addition to discussing the passing of counterfeit notes with petitioner in the fall of 1962, Paladinich found a temporary storage place for what might have been some of the printing paraphernalia, and that he gave Socie, as well as his brother, some of the notes to cash."

The fact is that petitioner claims that these allegations and the evidence he would introduce at a plenary hearing would show that he is innocent of all the charges.

II. THE TRIAL JUDGE SHOULD HAVE RECUSED HIMSELF.

The allegations in petitioner's motion for a new trial and in his 2255 motion, clearly indicate that the evidence de hors the record would show the petitioner to be innocent of the charges, and ought to be heard by another judge because of the fact that the trial judge has stated that he had an "abiding conviction" as to petitioner's guilt. See our discussion of this question at pages 39-41 of our Petition for a Writ of Certiorari.

III. THE SENTENCES IMPOSED ARE UNAUTHORIZED.

The cases cited by the Government (pages 7-8 of its Brief) are totally inapposite to the case at bar. These cases do not deal with the offenses charged in the case at bar. Rather, *Pereira v. United States*, 347 U.S. 1 deals with the Mail Fraud Statute, and *United States v. Krol*, 374 F.2d 776 deals with the offense against the defendant in that case of corruptly giving $200.00 to an Assistant United States Attorney to influence his action in a pending civil case. These cases therefore throw no light whatsoever on the issues involved in the petitioner's case. See our discussion of the law concerning this question at pages 35-38 of our Petition.

In the case of *Stanley, et al. v. United States*, No. 524 of this Court, October Term, 1970, the Memorandum of the Solicitor General points out that one of the two questions presented was:

> "2. Whether consecutive sentences could be imposed for both manufacture and possession of LSD where the possession was for other than personal use."

On page 7 of the Solicitor's Memorandum, in the last sentence, he states:

"Consequently, consecutive sentences for both manufacture and possession were not proper in this case where possession was solely incident to manufacture."

On December 7, 1970, this Court granted certiorari "insofar as it seeks review of the affirmance by the Court of Appeals (possession count) of the convictions of petitioners, Stanley, Thomas, and Massey. The judgment of the Court of Appeals as to these three individuals is vacated insofar as that count is concerned and the case is remanded to that Court so that it may consider the suggestions contained in the memorandum the Solicitor General has filed here. By this remand this Court intimates no view as to the merits of the Solicitor General's position. In all other respects the petition for a writ of certiorari is denied." Douglas, White, and Blackmun dissent.

We submit that the same rationale is applicable in the case at bar.

SUMMARY.

To deny the relief prayed for by the petitioner would be tantamount to a reversal by this Court of *Townsend v. United States*, 372 U.S. 293, *Sanders v. United States*, 373 U.S. 1, and *Kaufman v. United States*, 394 U.S. 217. These cases have firmly established the principle that a plenary hearing is required. No such hearing has ever been afforded to petitioner.

Unless this Court grants the Petition for a Writ of Certiorari and a hearing, petitioner will have been denied due process.

Respectfully submitted,

VINCENT SERMAN, *Petitioner*,
Pro Se.